93-46

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ANNABELLE L. MARTIN, *Petitioner,*

v.

SHEARSON LEHMAN HUTTON, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Joseph M. Chiarelli
Petitioner's Counsel Of Record

Donald F. Bayer
Petitioner's Counsel

Hoskins, King, McGannon & Hahn
1100 Commerce Trust Building
922 Walnut
Kansas City, MO 64106
(816)221-2416
(816)221-4530 (FAX)

Date: July 1, 1993

QUESTIONS PRESENTED

1. Is a district court's post-trial award of attorney's fees to a successful plaintiff under a uniform state securities fraud statute subject to reversal on the ground that the defendant was entitled to a federal jury trial on the issue of attorney's fees?

2. Did the appellate court commit plain error in reversing the jury's punitive damage award under a mistaken belief that respondeat superior liability was not submitted to the jury, when in fact the jury instructions used at trial clearly and unequivocally submitted the issue of respondeat superior pursuant to Missouri State Supreme Court approved instructions and case authority?

LIST OF PARTIES

The parties to the proceedings below were petitioner Annabelle L. Martin and respondent Shearson Lehman Hutton, Inc.

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v.

SHEARSON LEHMAN HUTTON, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Annabelle L. Martin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on February 18, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 986 F.2d 242 and reprinted in the Appendix ("App.") *infra* at A-1 - A-12 (cited herein as "Opinion, App.-___"). The Eighth Circuit's April 7, 1993 Order denying

petitioner's timely petition for rehearing and suggestions for rehearing en banc is reprinted at App. A-13.

The district court (Senior District Court Judge Scott O. Wright) initially granted a motion for summary judgment in this case which is reported at 738 F.Supp. 1278. The district court reconsidered and vacated its initial Order granting summary judgment in a subsequent unreported Order which is not germane to this court's consideration of the instant petition. Also unreported but reprinted in the Appendix, is the district court's January 9, 1992 Order denying respondent's alternative post-trial motions for judgment notwithstanding the jury's verdict, to vacate or remit the judgment for punitive damages, or for a new trial (App. A-14 - A-17) and, January 23, 1992 Order granting petitioner's post-trial motion for attorney's fees (App. A-18 - A-21).

JURISDICTION

Petitioner's complaint filed in the United States District Court for the Western District of Missouri invoked the court's jurisdiction under Section 27 of the Securities Exchange Act of

1934, 15 U.S.C. §78aa, Section 22 of the Securities Act of 1933, 15 U.S.C. §77v, and the prior doctrine of pendent jurisdiction.

Respondent timely appealed the district court's denial of its post-trial motions, as well as the district court's granting of petitioner's post-trial motion for attorney's fees. On February 18, 1993, the United States Court of Appeals for the Eighth Circuit entered its judgment affirming the jury's compensatory damage award to petitioner but reversing the jury's $500,000 punitive damage award and the district court's $225,141.25 post-trial award of attorney's fees. On April 7, 1993 the Eighth Circuit entered its order denying petitioner's timely petition for rehearing and suggestions for rehearing en banc.

This court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The pertinent portion of Mo. Ann. Stat. §409.411(a) (Vernon 1990) provides that a person:

> may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per year from the date of payment, costs,

and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. "**Damages**" is the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at eight percent per year from the date of disposition.

(Emphasis in original).

STATEMENT OF THE CASE

By anyone's definition, petitioner Annabelle L. Martin ("Martin") was an unsophisticated investor. She completed the tenth grade at Turner High School in Turner, Kansas, leaving school at the age of 16 to get married. Her work experience, in and out of the home, did not provide her with any background for making investment decisions. When Martin's husband retired from Southwestern Bell after 39 years of service, the Martins paid off all their debts and moved to Sunrise Beach, Missouri in 1986. Two years into retirement, Martin's husband unexpectedly died of a heart attack on August 12, 1988.

Martin sued respondent Shearson Lehman Hutton, Inc. ("Shearson") and its agent Robyn O'Leary ("O'Leary") based upon their fraudulent solicitation, recommendation and direction of Martin to invest all of her deceased husband's $100,000 death benefits in stock known as American Continental Corporation $3.44 Preferred ("AMCCP"). O'Leary falsely stated AMCCP was a safe investment with a secure dividend that was guaranteed to be repurchased by American Continental within three years, despite the fact Shearson management had specifically instructed O'Leary's supervisor to halt recommendations for AMCCP. (See Opinion, App.-2). Martin's claims against O'Leary were stayed when O'Leary filed bankruptcy.

Trial lasted five days, and Martin submitted the following six claims against Shearson to a seven person jury:

1. Controlling person liability under the federal securities laws ;

2. Common law fraud;

3. Common law negligent misrepresentation;

4. Common law negligence;

5. Common law breach of fiduciary duty; and

6. Controlling person liability under Mo. Ann. Stat. §409.411.

After one day of deliberations a unanimous verdict was returned for Martin on all six submitted theories of liability against Shearson. The jury awarded $28,795 in actual damages and $500,000 in punitive damages. Thereafter, the trial court also granted a post-trial award of attorneys' fees against Shearson under Mo. Ann. Stat. § 409.411(a) for $225,141.25. (App.-18).

On Shearson's appeal, the Eighth Circuit entered its judgment and opinion affirming the compensatory award, but reversing the trial court award of attorneys' fees and the jury's punitive damage award. The Eighth Circuit stated that §409.411 "is silent" as to whether the trial court or jury is to decide the relevant predicate facts regarding an award of attorneys' fees, but went on to hold that by not offering proof of fees at trial plaintiff "lost the right to recover fees" (Opinion, App.-10 - App.-11).

Regarding the punitive damage award, the Eighth Circuit acknowledged that "[t]he parties are in agreement that O'Leary's actions were in violation of the securities laws" (Opinion, App.-2), and that "[t]here is ample evidence in the record of course, from

which a reasonable fact-finder could have awarded [punitive] damages against O'Leary" (Opinion, App.-6). The opinion then erroneously states that "[t]here was no attempt here, ... to impose punitive damages on Shearson on the principle of respondeat superior" and, that there is nothing to support the punitive damage award against Shearson (Opinion, App.-7). In reaching the foregoing conclusion, the three judge appellate panel either mistakenly overlooked, misunderstood or simply ignored the undisputable fact that the theory of respondeat superior was submitted to the jury as the first element of Martin's fraud and negligent misrepresentation verdict directing instructions as required by Missouri law. Carter v. Willert Home Products, Inc., 714 S.W.2d 506 (Mo.banc 1986). The foregoing verdict directing instructions were incorporated by reference into the single punitive damage instruction, resulting in the jury considering punitive damages only if it previously found against Shearson (the employer) on the issues submitted in the verdict directing instructions, specifically including but not limited to the respondeat superior issue. Id.

Although Martin's petition for rehearing with suggestions for rehearing en banc were denied, Judges McMillian and Wollman would have granted rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Is Contrary To Well Established Precedent Of This Court, And Decisions Of the United States Court Of Appeals For The Eleventh And Fifth Circuits, Regarding When A Jury Trial Is Required In Federal Court On The Issue Of Attorney's Fees

A.
WHETHER OR NOT A JURY TRIAL IS REQUIRED IN FEDERAL COURT ON A GIVEN ISSUE IS DETERMINED BY FEDERAL, NOT STATE, LAW

It is elementary that some issues in a case may be tried to the court and other issues may be tried to the jury. Fed. R. Civ. P. 38(b), (c). The right to a jury trial as to any particular issue in federal court is a question of procedure to be determined according to federal law, even in cases where jurisdiction may rest upon diversity of citizenship. Simler v. Conner, 372 U.S. 221 (1963). This court has also held that the Seventh Amendment applies to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies

that are enforceable in an action for damages in the ordinary courts of law. Curtis v. Loether, 415 U.S. 189, 194 (1974).

Relying upon Simler, federal courts have held that the issue of attorneys' fees does not require a jury trial in federal court. See e.g.. Columbus Mills, Inc. v. Freeland, 918 F.2d 1575, 1578 (11th Cir. 1990) (noting that courts in a variety of contexts have held that the threshold question which triggers attorneys' fees is not a question for the jury). Even where attorney's fees are provided for in a contract and, therefore, "may" be decided by a jury, there is no absolute right to a jury trial on that issue and it is appropriate for a federal trial court to decide the attorney's fee issue. Resolution Trust Corp. v. Marshall, 939 F.2d 274 (5th Cir. 1991) (trial court could award fees under guaranty contract without jury, relying upon Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988) as support for the proposition that in federal courts attorneys' fees authorized by statute are properly awarded by the court as post-judgment matter collateral to the decision on the merits, Resolution Trust at 939 F.2d 280 fn. 2); Redshaw Credit Corp. v. Diamond, 686 F.Supp. 674 (E.D.Tenn. 1988) (jury returned damage award on breach of contract claim and trial court

awarded attorneys' fees under same contract on post-trial motion); A.G. Becker-Kipnis & Co. v. Letterman Commodities Inc., 553 F.Supp. 118 (1982) (liability and damage issues under parties' agreements are jury issues, and claims for costs and attorneys' fees under same agreements are for the court).

B.
THE UNIFORM SECURITIES COUNTERPART TO §409.411(a) HAS BEEN INTERPRETED TO PERMIT A POST-TRIAL MOTION FOR ATTORNEY'S FEES

While failing to acknowledge the precedents of this court and federal law from other circuits, the Eighth Circuit simply construed this case as one of first impression as to whether or not a state statute (Mo. Ann. Stat. §409.411) required a federal trial court or the jury to decide the issue of attorneys' fees, looking to state law and finding it "significant" that there were no Missouri cases under §409.411(a) where a court, not sitting in equity, made an award of fees. (See Opinion, App.-11 - App.-12).

The Missouri statute is based upon the Uniform Securities Act (Civil Liabilities) § 410 which, in turn, is substantially premised upon the federal securities laws. While the Eighth Circuit is correct that there are no Missouri cases wherein a Missouri court awarded attorneys' fees following the entry of a

jury's actual damage award, there are reported decisions of such action in other jurisdictions under those states' counterparts to the Uniform Securities Act §410 and Mo.Ann.St. §409.411. See Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984)(trial court awarding attorney's fees following jury award of actual damages); Washington Securities Act, RCW 21.20.430(1) which similarly allows for a purchaser to:

> ...sue either at law or equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

In Criticare Systems, Inc. v. Sentek, Inc., 465 N.W.2d 216 (Wis. Ct. App. 1990) the court found that the uniform statute is facially

ambiguous and reversed the trial court's denial of attorneys' fees after a jury awarded damages.

Thus, in both the Washington and Wisconsin cases it was clear that the trial court either in fact did, or was ultimately directed by the appellate court to, consider attorneys' fees even though a jury had awarded damages. Such an interpretation of the uniform statute not only directly supports the manner in which the district court resolved the issue of attorney's fees in this case, but is also consistent with prevailing federal law that the issue of attorney's fees is a collateral issue to be resolved by the trial court post-trial.

C.
SHEARSON'S ARGUMENT THAT ATTORNEY'S FEES CONSTITUTE AN ELEMENT OF "DAMAGES" IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE

Shearson asserted in its appeal that attorney's fees constitute "an element of damages" that had to be tried to the jury. The plain language of 409.411 (a), however, does not support this argument. The term **"Damages"** is expressly defined in the statute as "the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of

it and interest at eight percent per year from the date of disposition". There simply is no reference to attorney's fees being considered an element of damages to be considered and awarded by a jury.

Shearson's argument that attorney's fees constitute an element of damages to be tried to a jury is also inconsistent with the fact that the Eighth Circuit granted Martin's appellate motion for attorney's fees under §409.411, awarding her $9,999.37 on May 13, 1993. This appellate award of fees to Martin under §409.411 also serves to demonstrate that the Eighth Circuit did not implicitly reverse Martin's compensatory recovery on every theory except her federal securities claim, an argument that Shearson attempted to make before the Eighth Circuit in opposition to Martin's petition for rehearing.

D.
SHEARSON NEVER DEMANDED A JURY TRIAL ON THE ISSUE OF ATTORNEY'S FEES AND, BY ITS CONDUCT, EVEN CONSENTED TO THE POST-TRIAL PROCEDURE USED BY THE TRIAL COURT

If §409.411 is construed to grant Shearson a hybrid right to a jury trial as to attorneys' fees, the Seventh Amendment, Curtis v. Loether and Fed.R.Civ.P. 38 only required a jury trial if Shearson had made a demand for one, which it never did. Furthermore, the following exchange between the trial court and counsel during the instruction conference on the record demonstrates that Shearson clearly led the trial court and Martin's counsel to not only believe that Shearson continued to not demand a jury trial on the attorney's fee issue, but also consented to the established, accepted federal post-trial procedure of the trial court ruling the collateral attorneys' fee issue:

> [Martin's counsel] MR. BAYER: The other question I had, Your Honor, was we talked yesterday a little bit about the damage calculation and I'm not sure we came up with any conclusion or decision in terms of the computation of interest. Is that something that we should argue or is it --

THE COURT: No. That's something I --

MR. BAYER: -- just something that you want to --

THE COURT: If there's prejudgment interest, I'll -- if they get an award, I'll enter that.

MR. BAYER: Even with respect to those that provide it by statute?

[Martin's counsel] MR. CHIARELLI: Well, still it's just a judicial calculation.

THE COURT: Yeah. Yeah.

MR. BAYER: Okay.

MR. CHIARELLI: Is it all right giving --

THE COURT: Let me see now, you've got attorneys fees on there.

MR. CHIARELLI: 409.411. We --

THE COURT: Yeah.

MR. CHIARELLI: Post-trial if we --

THE COURT: Yeah. Yeah.

MR. CHIARELLI: But in terms of arguing the actual damages now then you argue everything except the interest computation which you'll take care of.

THE COURT: Yeah.

MR. BAYER: Can we tell them though that we're entitled to interest, but don't you worry about it, that's for the Court.

[Shearson's counsel] MR. GIFFIN: I don't think they need to tell them.

THE COURT: I don't think you need to do that.

MR. GIFFIN: And, Judge, I'd also -- I don't think they're entitled to tell them that under 409.411 they're entitled to attorneys fees.

THE COURT: No.

MR. BAYER: I've got no -- yeah.

THE COURT: No. No.

MR. GIFFIN: Okay.

MR. CHIARELLI: I agree. No reason to do that. Well, unless you --

MR. GIFFIN: Oh, I'm not going to --

MR. CHIARELLI: No, if you do anything like, oh, don't give these guys punitives because it's just attorneys fees.

MR. GIFFIN: Oh, no, I'm not going to make that argument.

THE COURT: No. No. (Emphasis added).

Shearson was not only never entitled to a jury trial on attorney's fees under federal law in the first place, but its failure to ever demand a jury trial on that issue and its manifested consent to the trial court ruling the issue post-trial clearly constituted a waiver of any conceivable right it could have even theoretically had to a jury trial on that issue. West v. Devitt, 311 F.2d 787 (8th Cir. 1963); see also Smith v. Cushman Motor Works Inc., 178 F.2d 953 (8th Cir. 1950) (where a party never makes a demand for a jury, and fails to object when the trial court announces it will be deciding a particular issue, the party waives its right to a jury on that issue).

II. The Eighth Circuit's Reversal Of The Jury's Punitive Damage Award Based Upon Its Erroneous Statement That Respondeat Superior Liability Was Not Submitted To The Jury Represents Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Warrant The Exercise Of This Court's Supervisory Powers To Prevent A Manifest Injustice From Occurring Which Would Render Martin's Right To A Jury Trial Meaningless

After acknowledging that "[t]he parties are in agreement that O'Leary's actions were in violation of the securities laws" (Opinion, App.-2) and that "[t]here is ample evidence in the record, of course, from which a reasonable fact-finder could have awarded [punitive] damages against O'Leary" (Opinion, App.-6), the Eighth Circuit makes the absolutely erroneous statement that "[t]here was no attempt here, ... to impose punitive damages on Shearson on the principle of respondeat superior" (Opinion, App.-7).

Pursuant to the district court's practice, jury instructions were initially prepared and submitted pre-trial in conformity with the Missouri Supreme Court's Approved Instruction (M.A.I.)

procedure. The M.A.I. procedure submits hypothesized ultimate issues, rather than detailed evidentiary issues, to the jury for resolution. The issue of respondeat superior was not only submitted to the jury as part of Martin's common law fraud and negligent misrepresentation claims, but was submitted in the M.A.I. format contemplated utilized by both parties in their respectively proposed pre-trial instruction packages.

Under Missouri law the principle of respondeat superior applies when what is complained of was done in the course of employment. If the employee's agency is disputed, M.A.I. 18.01 requires the plaintiff's verdict directing instruction to be modified to hypothesize the agency element, thereby submitting for the jury to find that the employee was acting within the "scope and course of employment". Carter v. Willert Home Products, Inc., 714 S.W.2d 506, 511 (Mo.banc 1986); M.A.I. 18.01. **This is exactly how both parties prepared their proposed instructions to submit the issue of respondeat superior in this case**. The first element of Martin's fraudulent misrepresentation claim verdict directing Instruction No. 17 and negligent misrepresentation claim verdict directing Instruction No. 18 required the jury to find:

First: that Robyn O'Leary was acting within the scope and course of her employment at Shearson Lehman Hutton, Inc. at the time she offered a security for sale to Annabelle Martin.

Likewise, when a verdict director contains the phrase "scope and course of employment", that phrase must be defined under the applicable M.A.I. 13 series of instructions. Carter, 714 S.W.2d at 511. **Again, this is exactly how both parties prepared their proposed instructions, and the manner the issue was submitted to the jury.** Instruction No. 13 defined "scope and course of her employment" pursuant to M.A.I. 13.07(1) as follows:

Acts of Robyn O'Leary were within the "scope and course of her employment", as that phrase is used in these instructions, if:

First, the conduct of Shearson Lehman Hutton, Inc. was such that an ordinarily careful and prudent person would believe that Robyn O'Leary had authority to perform such acts on behalf of Shearson Lehman Hutton, Inc., and

> Second, plaintiff Annabelle Martin reasonably relied on such conduct of Shearson Lehman Hutton, Inc. at the time of the transaction as mentioned in the evidence.

Finally, once the jury resolves the disputed agency issue against the employer under the verdict director, the jury is separately instructed in a subsequent punitive damage instruction. The damage instruction requires the jury to have found the liability issue in the verdict director against the employer and that such acts were done with the requisite evil motive or reckless disregard. See Carter, 714 S.W.2d at 513-14. **Again, this is exactly what both parties prepared in their proposed instructions and the manner that the issue was submitted.** The punitive damage instruction incorporated the verdict directing instructions by reference and required the jury to find that such acts were done with the requisite evil motive or reckless disregard as follows:

> If you find in favor of Annabelle Martin, and if you believe the conduct of Shearson Lehman Hutton, Inc. as submitted in any one of Instructions numbered 17, 18,

> 20, or 21 was outrageous because of Shearson Lehman Hutton Inc.'s evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find Annabelle Martin entitled under Instruction No. 24, you may award Annabelle Martin an additional amount as punitive damages in such sum as you believe will serve to punish Shearson Lehman Hutton, Inc. and to deter it and others from like conduct.

The jury was instructed and found against Shearson on the respondeat superior issue, and was then separately instructed to find that such acts by Shearson warranted punitive damages under the appropriate standard of M.A.I. 10.01 (New) pursuant to Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo.banc 1989). Martin was not required to submit the respondeat superior issue a second time within the punitive damage instruction, nor was the jury required make a second determination regarding that issue.

The Eighth Circuit unequivocally stated that "[t]here is ample evidence in the record, of course, from which a reasonable fact-finder could have awarded [punitive] damages against O'Leary" (Opinion, App.-6). Thus, there is no basis for Shearson

to argue there is insufficient evidence to submit Martin's common law fraud claim to the jury. Likewise, the same evidence that supports the submission of a common law fraud claim to a jury under Missouri law is the same evidence that supports submission of punitive damages under such a claim to the jury. Crues v. KFC Corp., 729 F.2d 1145 (8th Cir. 1984) (remand for retrial where, having submitted fraud issue to the jury, the district court erroneously failed to also submit punitive damages). In light of the opinion's finding that there was "ample evidence in the record, of course" to support a fraud claim and punitive damages, the same evidence supports the punitive damage award against Shearson under the submitted theory of respondeat superior.

Shearson never objected at trial to the manner in which the issue of respondeat superior liability was submitted to the jury, obviously because the issue was submitted in the accepted and expected format. From all indications, however, the Eighth Circuit either mistakenly overlooked, misunderstood or simply ignored, the clear and straight forward jury instructions that in fact submitted Shearson's respondeat superior liability in the only way it could have been submitted under the proper M.A.I. procedure

utilized by the district court and the parties. Whether by mistake, misunderstanding or oversight, if the Eighth Circuit's reversal of the punitive damage award under the erroneous premise that Shearson's liability was not submitted to the jury is allowed to go uncorrected, then Martin will suffer manifest injustice rendering her right to a trial by jury in federal court meaningless. This aspect of the petition admittedly represents a unique situation, but it is one that warrants the extraordinary exercise of this court's supervisory powers to correct the Eighth Circuit's patent error and prevent such an injustice.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

By Joseph M. Chiarelli

Joseph M. Chiarelli
Petitioner's Counsel Of Record
Donald F. Bayer
Petitioner's Counsel

Hoskins, King, McGannon & Hahn
1100 Commerce Trust Building
922 Walnut
Kansas City, MO 64106
(816)221-2416
(816)221-4530 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petitioner Annabelle L. Martin's Petition For Writ Of Certiorari were mailed, U.S. mail, postage pre-paid on this 1st day of July, 1993 to Reggie C. Giffin and Christopher D. Schneider, at Morrison & Hecker, 2600 Grand Avenue, Kansas City, Missouri 64108-4606, attorneys for Respondent Shearson Lehman Hutton, Inc.

Joseph M. Chiarelli

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-1475

Annabelle L. Martin,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the
v.	*	Western District of Missouri.
	*	
Shearson Lehman Hutton, Inc.,	*	
	*	
Appellant.	*	

Submitted: September 17, 1992

Filed: February 18, 1993

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Annabelle Martin sued Shearson Lehman Hutton for violations of federal and state securities laws, common-law fraud, negligence, and breach of fiduciary duty in connection with a

purchase that she had made of AMCCP, a preferred stock of American Continental Corporation ("ACC"). A jury returned a verdict for Martin in the amount of $28,795 in actual damages and $500,000 in punitive damages. Shearson appeals from judgments entered on these verdicts. Shearson also appeals from the court's award of attorneys' fees against it under Mo. Ann. Stat. §409.411(a) (Vernon 1990). We affirm the compensatory award and reverse with respect to punitive damages and attorneys' fees.

I.

Plaintiff was advised to buy AMCCP by one Robyn Ruppert O'Leary, who was an investment broker for Shearson. There was testimony that O'Leary had described the stock as a safe investment with a secure dividend and had guaranteed that ACC would repurchase it within three years, despite the fact that Shearson management had instructed its brokers to halt recommendations for AMCCP. The parties are in agreement that O'Leary's actions were in violation of the securities laws. O'Leary told Martin to purchase the stock through B.C. Christopher, another brokerage house, because O'Leary would soon be moving to Christopher. Martin followed the advice. When ACC filed for

Chapter 11 bankruptcy, all dividend payments on AMCCP ceased, and Martin's stock became worthless soon thereafter.

While Shearson raises numerous objections to the judgment against it, we note that each of plaintiff's theories of liability was submitted separately to the jury, and that all of plaintiff's theories were advanced to support the award of a single damage figure. It follows that if any of plaintiff's theories was submissible, the actual damage award may not be disturbed.

One of plaintiff's claims was that Shearson was liable as a "controlling person" pursuant to section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a). That statute states that any person who directly or indirectly controls any person who is liable for selling securities in violation of the act is liable to the same extent as the seller, unless he acted in good faith and did not directly or indirectly induce the act at issue. Shearson argues that it had too limited a connection to the sale at issue to be a controlling person, primarily because the sale was not consummated through its brokerage house and because the solicitation was directly contrary to its instructions to brokers, and

thus the relevant acts were not within the scope of O'Leary's employment.

Our precedents constrain us to disagree with Shearson's contentions on this point. We have held that the statute reaches persons who have only "some indirect means of discipline or influence" less than actual direction. Myzel v. Fields, 396 F.2d 718, 738 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968). In Metge v. Baehler, 762 F.2d 621, 631 (8th Cir. 1985), cert. denied, 474 U.S. 1057, 1072 (1986), we held that liability did not depend on the controlling person's having exercised control over the particular transaction that gave rise to the violation. We think that O'Leary's solicitation of the business while she was an employee of Shearson is sufficient to make out a prima facie case of controlling person liability. As the district court pointed out in its order denying Shearson's post-trial motions, Shearson's agent solicited the purchase of the stock and misrepresented its nature. Shearson had the ability to discipline O'Leary's conduct, and it was this conduct that gave rise to the loss. See also Lewis v. Walston & Co., 487 F.2d 617, 623-24 (5th Cir. 1973).

Shearson also complains of the trial court's Instruction No. 9, which stated, in pertinent part, that "'control' encompasses relationships such as that of a broker and a brokerage company." We are unsure of what these words were meant to convey: The word "encompasses" is vague and unclear in the context. Plaintiff asserts that the portion of the instrument complained of comes from Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1573-78 (9th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1621 (1991). That case holds that a brokerage house is, as a matter of law, a controlling person for purposes of the securities laws, but that the brokerage house is not liable if it can prove good faith and a lack of inducement.

We find no error in the court's instruction. Under our cases, it appears that Shearson's status as employer is sufficient to establish it as a controlling person. Once Martin established this, as she clearly did, she had made her prima facie case and Shearson's good faith or failure to induce O'Leary's actions were matters for the defense. See Metge, 762 F.2d at 631. In this case, Shearson does not complain that the issue of its good faith and lack of inducement was not properly submitted.

Finding no error in the submission of plaintiff's federal securities claim to the jury, we affirm the award of compensatory damages and the judgment based on it.

II.

Shearson also appeals the jury's award of punitive damages to Martin. The court instructed the jury that if it found for plaintiff on her common-law fraud claim, her misrepresentation claim, her negligence claim, or her breach of fiduciary duty claim, it could then award punitive damages against Shearson if it found that Shearson's conduct was "outrageous" because of its "evil motive or reckless indifference to the rights of others." Court's Instruction No. 26. (See M.A.I. §10.01 and Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo. 1989) (en banc).) The plaintiff takes no exception to this statement of the law.

We see nothing in this record to support a finding of punitive damages under this instruction. There is ample evidence in the record, of course, from which a reasonable fact-finder could have awarded such damages against O'Leary, but the conduct of Shearson itself seems to us to fall well short of that described in the relevant instruction. The fact that Shearson violated some of

its relevant internal rules, which it vigorously denies, would seem to us, on this record, to amount at most only to ordinary negligence. It was certainly not outrageous conduct. There was no attempt here, moreover, to impose punitive damages on Shearson on the principle of respondeat superior, and therefore that rationale for supporting the verdict, whatever may be the Missouri law on the subject, is unavailable to the plaintiff in this case. We therefore reverse the punitive damages judgment against Shearson.

III.

Finally, Shearson argues that the trial court erred in granting plaintiff's motion for attorneys' fees in the amount of $255,141.25. Plaintiff moved for these fees under Mo. Ann. Stat. §409.411(a) (Vernon 1990), which provides for the recovery of "reasonable attorneys' fees" by persons who succeed in suits brought under Missouri's securities laws.

A.

Shearson first maintains that fees are not awardable under the Missouri securities laws because it could not be a controlling person under the circumstances of this case. See Mo. Ann. Stat. § 409.411(b) (Vernon 1990). We reject this contention for the same reasons as we rejected, ante, the essentially identical argument in respect to the federal securities laws, on which the Missouri statute is quite evidently modeled.

B.

Shearson also calls attention to Mo. Ann. Stat. §409.411(a)(1) (Vernon 1990), which provides that any person who "offers or sells a security in violation of [Missouri law]...is liable to the person buying the security from him." Shearson asserts that this section cannot, as a matter of plain meaning, be applied against it in the circumstances of this case, since the plaintiff did not purchase any security from Shearson. Perhaps this is so, but Shearson misapprehends plaintiff's theory of the case. Plaintiff maintains, and we agree, that O'Leary was a seller or offeror, and that O'Leary was a person from whom the purchase was made, all within the meaning of the relevant

Missouri statutory scheme. See Pinter v. Dahl, 486 U.S. 622, 642-47 (1988), interpreting the corresponding provisions of the Securities Act of 1933. Shearson's liability is based, in turn, on its being a controlling person with respect to O'Leary. Shearson points to some cases interpreting state securities laws similar to Missouri's that it asserts require strict privity before liability can attach. See, e.g., In re Diasonics Securities Litigation, 599 F. Supp. 447 (N.D. Cal. 1984), and Nikkel v. Stifel, Nicolaus & Co., 542 P.2d 1305 (Okla. 1975). Whatever the purport of those cases may be, we believe that the Supreme Court of Missouri, which has not as yet ruled on this matter, would be persuaded by the reasoning of the Court in Pinter. Besides the appealing character of the logic that appears there, there is the fact that the Missouri statute follows the federal statutory scheme quite closely.

C.

Shearson also urges this court to hold that under the relevant Missouri law plaintiff was required to put the question of attorneys' fees to the jury as part of its case on damages -- that, in other words, the trial court had no authority to award those fees pursuant to a post-trial motion. The statute states that a

person protected by it "may sue...to recover the consideration paid for the security, together with interest...and reasonable attorneys' fees." Mo. Ann. Stat. §409.411(a) (Vernon 1990).

Statutes providing for attorneys' fees frequently indicate who the relevant fact-finder should be. Under 42 U.S.C. §1988(b), for instance, the judge awards fees in civil rights cases. In Missouri, to take another example, insurers are liable for "a reasonable attorney's fee" for a vexatious refusal to pay a claim; and the relevant statutes provide that the amount is to be fixed by "the court or jury," depending, presumably, on whether the trial itself is to a judge or to a jury. See Mo. Stat. Ann. § 375.296, § 375.420 (Vernon 1991). Therefore, when the trial in such a case is to a jury, the Missouri model jury instructions include a verdict form containing a blank for an amount "for attorney fees." See M.A.I. § 36.10.

Here, the statute is silent on the question of who should find the relevant predicate facts. It is Shearson's position that the fees are part of the damages recoverable and must therefore be fixed by the jury. There is no Missouri case squarely on point, though in Dunn v. Bemor Petroleum, Inc., 680 S.W.2d 304, 307

(Mo. Ct. App. 1984), which the trial court had decided on a motion for summary judgment, the court assumed that if the case had been triable to a jury the question of fees would have been for the jurors. The court held, however, that the trial court was sitting in equity and would therefore have ruled on the question of fees in any event. Id. See also Monetary Management Group v. Kidder, Peabody & Co., 615 F.Supp. 1217, 1224-25 (E.D.Mo. 1985) (court, sitting in equity, awarded fees on the basis of a post-trial motion).

On balance, we believe that Shearson has the better of the argument. The plaintiff chose to bring her action at law when the applicable statute gave her the choice to sue at law or in equity. The statute provides that the amounts recoverable include attorneys' fees, and plaintiff put on no proof during the trial as to what they were. Based on the Missouri practice relevant to suits for vexatious refusal, and the limited Missouri precedents bearing on this particular issue, we hold that plaintiff has lost the right to recover attorneys' fees. We think it significant that plaintiff was unable to direct our attention to a case under Mo. Ann. Stat.

§409.411(a) (Vernon 1990) where a court, not sitting in equity, made an award of fees.

We therefore reverse the district court in this respect.

For the reasons given, we affirm the judgment below with respect to compensatory damages, and reverse the judgments for punitive damages and attorneys' fees.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-1475WMJC

Annabelle L. Martin,	*	
	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion
v.	*	for Rehearing En Banc
	*	
Shearson Lehman Hutton, Inc.,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied. Judge McMillan and Judge Wollman would grant the suggestion.

The petition for rehearing is also denied.

Judge John R. Gibson took no part in the consideration or decision of this case.

April 7, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

HELEN E. SWEASEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 89-4558-CV-C-5
	)	
A. G. EDWARDS & SONS, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

The Court has reviewed Defendant Shearson Lehman Hutton, Inc.'s alternative motions for judgment notwithstanding the verdict and to vacate the judgment for punitive damages, or to remit the punitive damages, or for a new trial on all issues. A court has authority to enter a judgment notwithstanding the verdict or to grant a new trial where the jury verdict is clearly contrary to the evidence. Fed.R.Civ.P. 50 and 59. Similarly, a court has much discretion to grant a motion to alter the judgment in order to prevent a miscarriage of justice. A.W. v. Northwest R-1 School Dist., 813 F.2d 158, 164-65 (8th Cir. 1987); Fed.R.Civ.P. 59(e). A movant must meet a stringent standard to demonstrate

that a jury's verdict should be set aside. Western American, Inc. v. Aetna Cas. & Sur. Co., 915 F.2d 1181, 1183 (8th Cir. 1990).

This case involves Plaintiff Martin's claims of securities fraud against Shearson Lehman. The case was tried to a jury. On September 11, 1991, the jury rendered a verdict favorable to plaintiff and awarded $28,795 in actual damages and $500,000 in punitive damages. The Court finds adequate support in fact and law for the verdicts rendered by the jury. Therefore, defendant's alternative motions will be denied.

The Court has previously rejected defendant's attempt to characterize the essence of Plaintiff Annabelle Martin's claims as concerning liability for actions done outside of Shearson's authority. The facts revealed that defendant's agent completed the act of solicitation and misrepresented the nature of American Continental Corporation Preferred Stock while she was still an employee of Shearson Lehman. The evidence demonstrated, and the jury found, that Ms. Martin had a client relationship with Shearson Lehman. The evidence supports that jury's verdict that Shearson was liable for the failure to adequately supervise its agent and for misrepresentations and omissions of material fact.

The Court finds no basis for defendant's motion based on alleged improper jury instructions or failure to submit defendant's requested instructions. The Court determines that Defendant Shearson Lehman's constitutional challenge to the punitive damages award is without merit. The jury awarded a reasonable punitive damage award, after being instructed that it must find defendant's conduct "outrageous because of defendant's evil motive or reckless indifference" and then must consider whether punitive damages were proper to punish defendant or to deter others. Missouri Approved Instructions 10.01 (1991). The amount of the punitive damages award is not unreasonable considering the evidence.

Defendant's other legal arguments have been previously considered and this Court finds no reason to reconsider its rulings. Defendant has failed to demonstrate that the jury verdict is clearly contradictory to the evidence or that any other reason exists to disturb the jury verdict.

Therefore, it is hereby

ORDERED that defendant's motion for judgment notwithstanding the verdict and to vacate the judgment for

punitive damages, or alternative motion to remit the punitive damages, or alternatively for a new trial on all issues is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

January 9, 1992.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

HELEN E. SWEASEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 89-4558-CV-C-5
	)	
A. G. EDWARDS & SONS, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff Annabelle Martin's motion for attorneys' fees under Missouri Annotated Statutes §409.411 (1990). Plaintiff Martin and other plaintiffs brought suit against Shearson Lehman Hutton, Inc. and other defendants for claims involving federal and state securities laws. Plaintiff Martin's case was tried to a jury, and on September 11, 1991, the jury returned a verdict in favor of plaintiff on all claims submitted. The jury awarded Ms. Martin $28,795 in actual damages and $500,000 in punitive damages on her federal and common-law claims. It awarded her $28,795 as actual damages on her claim under Mo. Ann. Stat. § 409.411. Plaintiff now seeks attorneys' fees in the

amount of $255,141.25 for the finding that defendant violated Section 409.411. For the reasons expressed below, plaintiff's motion is granted.

Degree of success is a critical factor in determining an award of attorneys' fees. Hensley v. Eckerhart, 461 U.S. 424, 435-36 (1983) (reasonable attorney's fee under civil rights statute). Other factors for a court to consider include quality of the representation, the reasonable fees and hours expended according to the location and the circumstances. See Heilbron v. ARC Energy Corp., 757 S.W.2d 294, 296-97 (Mo. App. 1988).

Shearson objects to the attorneys' fees motion. It does not dispute the rate of the counsels' fees or the fact that counsel is competent and well-respected. However, Shearson maintains that counsels' skill is reflected and well-compensated within the hourly rates charged. Shearson contends that the fees requested are unreasonable in contrast to the amount of damages awarded on the Section 409.411 claim, that this case is not exceptional, and that plaintiff's counsel fails to meet its burden to show the reasonableness of the fees requested. Additionally, defendant suggests that plaintiff's fee award should be reduced because the

legal work benefitted plaintiff and co-plaintiffs in prosecuting their claims, in arbitration, against Shearson and other defendants.

Shearson also objects on many of the same grounds it presented in its post trial motions. Those legal arguments were reviewed and rejected by the Court previously and will not be addressed here. Shearson argues that plaintiff waived her right to attorneys' fees by failing to present evidence at trial on those fees and by not submitting the fees claim to the jury. Those arguments are without merit.

The Court finds that plaintiff's counsel has requested a reasonable fee, based upon reasonable hours. The type of work and amount of hours spent are well documented and itemized. Shearson concedes that unique legal questions were presented in this case. In fact, plaintiff only went to trial after the Court granted her motion to reconsider its previous ruling on a dispositive motion. Plaintiff's degree of success was high, with respect to the Section 409.411 claim. The fact that she did not receive all the damages requested does not diminish her success.

It is hereby

ORDERED that plaintiff's motion for attorneys' fees is granted. Plaintiff is awarded attorneys' fees, in conjunction with her claim under Missouri Annotated Statutes §409.411, in the amount of $225,141.25.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

January 23, 1992.

AUG 05 1993

No. 93-46

In The

Supreme Court of the United States

October Term, 1993

ANNABELLE L. MARTIN,

Petitioner,

v.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REGGIE C. GIFFIN*
CHRISTOPHER D. SCHNEIDER
MORRISON & HECKER
2600 Grand Avenue
Kansas City, Missouri 64108-4606
(816) 691-2600

Attorneys for Respondent

**Counsel of Record*

Dated August 5, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent Shearson Lehman Hutton Inc. ("Shearson") respectfully suggests that the issues framed by petitioner Annabelle L. Martin ("Martin") are more accurately stated as follows:

1. Did the court of appeals correctly reverse the trial court's award of attorneys' fees to Martin under Mo. Rev. Stat. § 409.411 because, under that statute and Missouri law, attorneys' fees are damages which Martin waived when she failed to submit any evidence of attorneys' fees and failed to submit the issue to the jury?

2. Was the court of appeals correct in reversing the jury's award of punitive damages because under Missouri law there was insufficient evidence in the record concerning the outrageous conduct or evil motive of Shearson and because Martin was not entitled to punitive damages under a claim of Shearson's common law *respondeat superior* liability for the acts of Robyn O'Leary?

LIST OF PARTIES

Petitioner Annabelle L. Martin

Respondent Shearson Lehman Hutton, Inc.[1]

---

[1] Until July 30, 1993 respondent Shearson Lehman Hutton, Inc. was a wholly-owned subsidiary of Shearson Lehman Hutton Holdings, Inc., which was in turn owned by the American Express Company and the Nippon Life Insurance Company. On July 30, 1993 respondent was sold to and became a wholly owned subsidiary of Primerica and is now doing business as Smith Barney Shearson, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Shearson requests that the Court deny Martin's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTE INVOLVED

The only statute at issue in this case is Mo. Rev. Stat. § 409.411, the Missouri statute governing liability for unlawful securities transactions.

STATEMENT OF THE CASE

Martin's petition omits several material facts. The issues presented involve questions relating to damages under a state securities statute and state common law principles arising out of two purchases of American Continental Corporation Preferred Stock ("AMCCP").

The purchases in question were not made through Shearson. Rather, both purchases were made through B.C. Christopher Securities Company ("Christopher"), a competing brokerage firm. Martin was directed to Christopher by Robyn O'Leary ("O'Leary"), a Shearson employee, even though Shearson had placed restrictions on AMCCP and had directed O'Leary to make no further recommendations of AMCCP. It was undisputed that, when Martin told O'Leary she wished to purchase AMCCP, (1) O'Leary stated to Martin that Martin should

make the transactions at Christopher because O'Leary was leaving Shearson and joining Christopher;[2] (2) on two separate dates, Martin wrote two checks (one for $60,000 and one for $40,000) to Christopher to purchase AMCCP; (3) Martin received confirmation of the purchases from Christopher; (4) Martin received statements from Christopher showing the securities, and the value thereof, in her account at Christopher; and (5) Martin never signed a client agreement with Shearson. It was further undisputed that Shearson did not receive any commission or other benefit from the transactions.

Although Martin may have been an unsophisticated investor, her investment decision was made with the assistance of her son, Dr. Jeff Martin, who had prior investment experience and understood the relationship between risk and return, *i.e.*, that an investment with a higher return carried a higher risk. After reviewing information provided by O'Leary and having conversations with O'Leary, Jeff Martin reported to Martin that there was a 9% investment and a 19% investment with a guaranteed buy back on the 19% investment, but never identified AMCCP by name. After reviewing the options with her son, Martin called O'Leary and said she wished to purchase the higher return investment which O'Leary then identified to her as AMCCP. Martin stated that she wanted to purchase AMCCP and was then directed to Christopher by O'Leary and made the transaction there. The identification of AMCCP to Martin, her decision to purchase it and the direction to do the first transaction at

---

[2] On December 13, 1988, O'Leary did in fact leave the employ of Shearson and become employed by Christopher.

Christopher all occurred in the same conversation. There was a second conversation between Martin and O'Leary, in which Martin said she had more money and wanted to buy more AMCCP. O'Leary again told her to do the transaction at Christopher. The purchases were made on October 19 and October 20, 1988. On April 13, 1989, ACC filed for Chapter 11 bankruptcy. The dividend payments on AMCCP ceased and by June, 1989, Martin's AMCCP stock was essentially worthless.

On December 29, 1989, Martin sued Shearson and O'Leary alleging that O'Leary had misrepresented the safety and "buy back" provision of AMCCP. Martin alleged that Shearson was responsible for the acts of O'Leary as a "controlling person" under federal and state securities laws and was also responsible for O'Leary's fraud and/or negligence under a theory of apparent authority. In addition, Martin asserted claims directly against Shearson for negligence and breach of fiduciary duty. In her complaint, Martin demanded a jury trial on all issues "triable to a jury." Shearson did not make a further jury demand.

Martin's case was tried to a jury. During the trial, she did not submit any evidence concerning her attorneys' fees under Mo. Rev. Stat. § 409.411 and tendered a damage instruction to the jury which omitted any claim for attorneys' fees. The jury returned a verdict against Shearson on Martin's claims for (1) controlling person liability under the federal securities laws; (2) common law fraud; (3) common law negligent misrepresentation; (4) common law negligence; (5) common law breach of fiduciary; and (6) controlling person liability under Mo. Rev. Stat. § 409.411, awarding her $28,795 in actual damages and

$500,000 in punitive damages. After the jury verdict, Martin filed a motion requesting the trial court to award her attorneys' fees under Mo. Rev. Stat. § 409.411 in the amount of $225,141.25. Shearson objected to such motion on the ground, among others,[3] that Martin had not presented evidence on her attorneys' fees or presented that issue to the jury as she was required to do under Mo. Rev. Stat. § 409.411. The trial court entered its order awarding Martin attorneys' fees on January 23, 1992. Shearson filed a timely Notice of Appeal on February 26, 1992 following the trial court's Order of February 14, 1992 which disposed of all claims as to all other parties in the action. On February 18, 1993, the Court of Appeals affirmed the award of actual damages under Section 20 of the 1934 Securities Act, 15 U.S.C. § 77l, but reversed the trial court's award of attorneys' fees and the punitive damage award in their entirety.

Construing Mo. Rev. Stat. § 409.411, the court of appeals reversed the award of attorneys' fees holding that they were part of the damages recoverable under the Missouri statute and that because Martin had brought her action at law, she waived her right to attorneys' fees when she failed to offer any evidence during the trial as to what those attorneys' fees were. The court stated:

> "Based on the Missouri practice relevant to suits for vexatious refusal, and the limited Missouri precedents bearing on this particular issue, we

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[3] Shearson also argued that the amount of the fees awarded were per se unreasonable because they were 7-8 times the actual damages awarded and almost twice the maximum potential recovery under Mo. Rev. Stat. § 409.411.

> hold that plaintiff has lost the right to recover attorneys' fees. We think it significant that plaintiff was unable to direct our attention to a case under Mo. Ann. Stat. § 409.411(a) (Vernon 1990) where a court, not sitting in equity, made an award of fees."

(Opinion, App. 11-12.)

The court of appeals reversed the punitive damages award, holding there was nothing in the record to support a finding of punitive damages under the jury instructions submitted by Martin. The court of appeals specifically found that the punitive damages instructions submitted by Martin did not attempt to impose punitive damages on Shearson under the principle of *respondeat superior*.

REASONS FOR DENYING THE WRIT

This case presents only questions of state law. The court of appeals' ruling that Martin was not entitled to attorneys' fees was based on its construction of a Missouri statute. Its ruling that she was not entitled to punitive damages was based on Missouri case law and the Missouri Approved Instructions on punitive damages. Because neither of these rulings presents a federal question or is in conflict with other federal court precedents and because both rulings were fully in accord with Missouri law, the court of appeals' decision does not merit review by this Court.

I. THE COURT OF APPEALS' RULING THAT UNDER MO. REV. STAT. § 409.411 ATTORNEYS' FEES WERE AN ELEMENT OF MARTIN'S DAMAGES MARTIN WAIVED WHEN SHE REQUESTED A JURY TRIAL AND FAILED TO SUBMIT EVIDENCE CONCERNING HER FEES TO THE JURY WAS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OTHER COURT OF APPEALS.

A. Once Martin Made A Jury Demand, The Issue Of Whether Attorneys' Fees Were Damages Under Mo. Rev. Stat. § 409.411 Such That Evidence Of Those Damages Must Be Submitted To The Jury Was A Question Of Missouri Rather Than Federal Law.

The court of appeals properly reversed the trial court's award of attorneys' fees because under Mo. Rev. Stat. § 409.411 attorneys' fees are an element of damages and Martin waived her right to those damages when she requested a jury trial on "all issues . . . so triable" (Complaint 12/29/89, ¶ 89) but then failed to present any evidence of attorneys' fees to the jury. Martin's argument that the court of appeals' ruling is incorrect because *Shearson* did not demand a jury trial on the issue of attorneys' fees when she had in fact made such a demand is, at most, a procedural question of little importance which does not require this Court's attention.

Martin claims that the court of appeals' decision is contrary to Supreme Court precedent and is in conflict with other circuit court decisions because the question of whether a jury trial is required on the issue of attorneys' fees must be determined by federal, rather than state, law. An examination of the opinion below demonstrates

that it was correctly decided and is not in conflict with any decision of this Court or other United States Court of Appeals.

Neither the Seventh Amendment nor any other provision of federal law is implicated by the court of appeals' decision because it was *Martin* who requested that her claim be submitted to a jury. This would include any claim for damages, including attorneys' fees, under Mo. Rev. Stat. § 409.411. Once that jury demand occurred, Martin's right to attorneys' fees became a question of damages to be determined by state law and specifically became an issue of the interpretation and application of the Missouri statute. The court of appeals correctly determined that Mo. Rev. Stat. § 409.411 required Martin to submit proof of such damages to the jury.

In a strained attempt to convince this Court that review of this case is warranted, Martin argues that the availability of attorneys' fees under a Missouri state statute is a question of federal law and that the court of appeals' interpretation of that state statute is in conflict with precedent handed down by this Court and other circuits. The cases cited by Martin, however, do not address the Missouri statute involved in this case and held only that the federal right to a jury trial did not apply to claims for attorneys' fees based upon the contract or statute under consideration in those cases.

The right to a jury trial is not involved in this case. Martin demanded a jury; Shearson acquiesced in and relied upon this demand. Therefore, all issues properly triable to a jury should have been submitted to the jury. The court of appeals correctly construed the question of

attorneys' fees under Mo. Rev. Stat. § 409.411 to be a matter of *damages* governed by Missouri *state* law that had to be submitted to the jury, rather than an issue of a right to a jury trial under federal law.

Martin sought attorneys' fees from Shearson as part of her damages allowed under Mo. Rev. Stat. § 409.411. Under Missouri law, when attorneys' fees are an integral part of a plaintiff's legal damage claim, the trier of fact must decide the issue of fees in the context of the overall damages sought. The court of appeals correctly held that it was incumbent on Martin to submit proof of attorneys' fees to the jury as part of her damages under the statute. See *Dunn v. Bemor Petroleum, Inc.*, 680 S.W.2d 304, 307 (Mo. App. 1984) (court assumed if claim under Mo. Rev. Stat. § 409.411 had been tried to a jury, the question of fees would have been for the jurors); *Hester v. American Family Mutual Insurance Co.*, 733 S.W.2d 1, 3 (Mo. App. 1987) (where plaintiffs sought attorneys' fees under Missouri vexatious refusal statute, issue of fees was erroneously submitted to the jury where no evidence of fees was offered at trial).

When Martin elected to try the issues in this case to a jury, all issues, including attorneys' fees under Mo. Rev. Stat. § 409.411, became triable to the jury. Martin, therefore, had the obligation to produce evidence of those fees. See *Quick v. Woody*, 747 S.W.2d 108, (Ark. 1988) (plaintiffs waived right to attorneys' fees under Arkansas Securities Act by failing to put on evidence of fees at trial); *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984) (attorneys' fees integral part of damages under Jones Act claim and plaintiff waived fees by failing to submit evidence of fees to jury). The court of appeals

properly ruled that attorneys' fees were an element of damages under Mo. Rev. Stat. § 409.411 and that Martin lost her right to recover attorneys' fees when she failed to submit evidence concerning fees and failed to tender an instruction requiring the jury to assess fees.

Martin argues that the issue of attorneys' fees under Mo. Rev. Stat. § 409.411 is a matter of federal law and that federal law does not require the issue of attorneys' fees to be presented to the jury. The cases cited by Martin for this proposition are not in point because they do not address attorneys' fees that are an integral part of the damages allowed by statute as is the case with Mo. Rev. Stat. § 409.411. *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575 (11th Cir. 1990), addressed a statute which specifically stated that the court was to decide the predicate facts which would allow attorneys' fees. *Columbus Mills*, 918 F.2d at 1577 n.1. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988), addressed a statute which specified that attorneys' fees were to be taxed and collected as "costs" rather than as part of the actual damages. In *Budinich*, this Court specifically distinguished statutes allowing attorneys' fees as costs from statutes which treat fees as substantive or legal relief. *Budinich*, 486 U.S. at 201.

The holdings of *Resolution Trust Corp. v. Marshall*, 939 F.2d 274 (5th Cir. 1991), *Redshaw Credit Corp. v. Diamond*, 686 F. Supp. 674 (E.D. Tenn. 1988) and *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118 (N.D. Ill. 1982) are also inapplicable because they were all limited to instances where attorneys' fees were sought under a contract and, therefore, were more properly characterized as an equitable remedy collateral to the decision on the merits. In contrast, attorneys' fees under Mo. Rev.

Stat. § 409.411 cannot be considered "costs" or an equitable remedy collateral to the issues on the merits. The Missouri statute requires the trier of fact to add attorneys' fees to the consideration paid for the securities prior to deducting the income received from the securities before the trier of fact can arrive at the final damages figure. As a result, it is essential for the trier of fact to decide the issue of attorneys' fees before the damages allowable under the statute can be finally determined.

Martin also claims that the court of appeals' interpretation of Mo. Rev. Stat. § 409.411 is incorrect because other courts have interpreted other state securities statutes differently. However, decisions from other courts interpreting different state statutes have no relevance with respect to the court of appeals' interpretation of Missouri law and do not present any conflict among the circuits requiring resolution by this Court. Nor do questions of interpretation and application of a state statute, even a uniform act, present "important questions of *federal* law" that should be settled by this Court. Rule 10.1(a)(c), Rules of the Supreme Court of the United States. Further, the cases cited by Martin, *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984), and *Criticare Systems, Inc. v. Sentek, Inc.*, 465 N.W.2d 216 (Wis. App. 1990), are not in conflict with the reasoning or results of the court of appeals because neither case addressed a claim that the plaintiff waived her right to fees because she failed to present evidence of her fees to the jury.

Martin argues that Shearson was not entitled to a jury trial on attorneys' fees because it did not make a jury demand on the issues of attorneys' fees. This argument comes close to conceding that Fed. R. Civ. P. 38 and the

Seventh Amendment, as interpreted in *Curtis v. Loether*, 415 U.S. 189 (1974), would have required a jury trial if Shearson had demanded one. Apparently, Martin's argument is that if Shearson had demanded a jury trial on the issue of attorneys' fees under § 409.411, that issue would have been required to be decided by the jury but since it was Martin who demanded the jury trial, a jury trial on the issues of attorneys' fees was not required. This argument completely undermines Martin's position regarding attorneys' fees because Shearson was entitled to rely upon Martin's jury demand.[4] *See Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76, 77-8 (2d Cir. 1974); *Pinemont Bank v. Belk*, 722 F.2d 232, 235 (5th Cir. 1984); and *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 690 (9th Cir. 1976). The argument that the court of appeals erred because Shearson had not demanded a jury trial is untenable, and in any event presents an insignificant procedural issue that does not warrant the attention of this Court.

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[4] This argument is also inconsistent with Rule 38 Fed. R. Civ. P. Rule 38(b) which provides that any party may demand a jury trial on *"any issue triable of right . . . "*; Rule 38(c) then provides that a party who has not specified that only certain issues be tried to the jury is "deemed to have demanded trial by jury for all the issues so triable," and that in the event a demand is made for a jury trial on only certain issues, any other party can demand a trial on other issues; finally 38(d) provides that once a demand has been made it may not be withdrawn without the consent of the *parties*. The provision in 38(c) that an unspecified demand is a demand for trial of all issues and the use of the plural *"parties"* in 38(d) clearly establishes that all parties to the litigation can rely on a jury demand made by any party.

B. Shearson Did Not Consent To The Trial Court Deciding The Issue Of Attorneys' Fees As Part Of Martin's Damages.

In an attempt to avoid the consequences of her failure to submit the issue of attorneys' fees to the jury, Martin argues that certain statements made by Shearson's counsel during the instruction conference constituted Shearson's "consent" to having the trial court decide the issue. This is a highly strained misinterpretation of statements made by Shearson's counsel and there is no basis to conclude that Shearson consented to the trial court hearing the issue of attorneys' fees on a post-trial motion.

The timing of the statements relied upon by Martin is particularly significant. The quoted statements occurred at the instruction conference *after the close of the evidence.* Martin had rested her case and all of the evidence had been heard. Martin had failed to produce evidence as to her attorneys' fees as she was required so that the jury could have some basis for making a decision on the issue. Martin had simply failed to present evidence on an element of her required proof. It did not then become incumbent upon Shearson's counsel to raise this failure with the trial court or Martin's counsel or ask that the record be reopened so that evidence of attorneys' fees could be presented to the jury. It is also significant that the issue of whether Martin was entitled to attorneys' fees was not before the trial court at that time. It was appropriate for Shearson to wait until that issue was presented to the court and then raise its objection at that time.

Nor do the statements cited by Martin considered in context constitute consent by Shearson. The discussion was about what could be properly argued to the jury in connection with damages. Counsel for Shearson stated "I don't think they are entitled to tell them that under § 409.411 they are entitled to attorneys' fees". This was completely proper because there had been no evidence of attorneys' fees and, without such supporting evidence, it would be improper to argue such fees to the jury. By no reasonable interpretation can this be viewed as consent to have the trial court decide the matter on post-trial motion.

This situation is not analogous to *West v. Devitt*, 311 F.2d 787 (8th Cir. 1963) or *Smith v. Cushman Motor Works*, 178 F.2d 953 (8th Cir. 1950). In *West* and *Smith*, there was express and unequivocal consent given for the court to address certain issues *prior* to the presentation of any evidence to the jury. Additionally, the plaintiff in *Smith* never demanded a jury trial. In the present case, there had been a jury demand and Shearson never expressed any consent which would allow Martin to bypass the jury with respect to her damages including attorneys' fees. The simple fact is Martin failed to present evidence concerning an essential element of damages and Shearson raised its objection to Martin's attempt to recover attorneys' fees the first time the issue was presented to the trial court.

II. THERE IS NO BASIS FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWER BECAUSE THE COURT OF APPEALS' REVERSAL OF THE JURY'S PUNITIVE DAMAGE AWARD WAS CORRECT AND WAS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A. There Was No Affirmance Of Any Common Law Verdict On Which *Respondeat Superior* Liability For Punitive Damages Could Be Based.

The court of appeals correctly reversed the jury's award of punitive damages, and Martin's arguments concerning the reversal of the punitive damages award do not merit review by this Court. The sufficiency of evidence concerning the submission of a claim for punitive damages is determined by state common law and does not present any question that requires the consideration of this Court. The court of appeals correctly applied the standard set forth by the Missouri Supreme Court in *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989 en banc), when it determined that the evidence submitted did not establish that Shearson's conduct warranted the imposition of punitive damages.

There was *no* affirmance by the court of appeals of any common law verdict on which *respondeat superior* liability for punitive damages could be based. The court of appeals' opinion only directly affirmed the liability of Shearson under the controlling person sections of the federal securities laws and, at most, tacitly affirmed the verdict on the state securities statute (Opinion, App. 3-6, 8-9.) It is well established that there can be no punitive

damages awarded under federal securities law claims. *Grogan v. Garner*, 806 F.2d 829 (8th Cir. 1986); *Nye v. Blyth, Eastman Dillon & Co. Inc.*, 588 F.2d 1189, 1200 (8th Cir. 1978). The same is true for Missouri securities law claims. *Gales v. Weldon*, 282 S.W.2d 522 (Mo. 1955). In the absence of affirmance of any common law liability which would support an award of punitive damages, Martin's claims concerning errors in the reversal of the punitive damage award need not be considered and it certainly cannot be said that the court of appeals' ruling is so great a departure from the accepted and usual cause of judicial proceedings that this Court's power of supervision is called for by Certiorari.

B. The Court of Appeals Correctly Ruled That There Was Insufficient Evidence To Support A Finding Of Punitive Damages Under Instruction No. 26.

The court of appeals correctly held that there was nothing in the record to support a finding of *respondeat superior* liability for punitive damages under Instruction No. 26. (Opinion, App. 6.) Martin argues she did in fact submit punitive damages to the jury under a *respondeat superior* theory and that the evidence supporting her claims against Shearson for fraudulent and negligent misrepresentation was sufficient to support a claim for punitive damages. Instruction No. 26, which was drafted and tendered by Martin, did not properly submit the issue of punitive damages because it did not require the jury to find that O'Leary's conduct was outrageous as required by Missouri law. *See, Burnett v. Griffith, supra.* Martin's

argument that the instructions on her claims of fraudulent and negligent misrepresentation (Instruction Nos. 17 and 18) were adequate to submit the issue of punitive damages is flawed because those instructions likewise did not submit the issue of O'Leary's outrageous conduct. They required the jury to find only that "O'Leary did not know whether her representations were true or false. . . . " This does not rise to the level of outrageous conduct because of an evil motive or reckless indifference as required by Missouri law. *Burnett v. Griffith, supra*. The simple fact is that nowhere was the jury told that it had to find that the conduct of O'Leary was outrageous in order to award punitive damages. Instruction No. 26 only specifically submitted Shearson's outrageous conduct. There was insufficient evidence to submit the issue of whether Shearson's conduct was outrageous. The court of appeals was thus correct when it held that Instruction No. 26 did not properly submit the issue of punitive damages on a *respondeat superior* basis.

Instruction No. 26 also did not properly allow for punitive damages because it submitted four separate bases for an award of punitive damages in the disjunctive: the fraudulent misrepresentations of O'Leary, the negligent misrepresentations of O'Leary, the negligence of Shearson and the breach of fiduciary duty by Shearson.[5] The jury could have reached its verdict of punitive damages on any one of these bases. Under Missouri law,

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[5] It is again highly significant that the court of appeals' affirmance of the liability verdict was not based on any of these claims. Thus, there was no affirmance of any common law claim to support an award of punitive damages.

when disjunctive claims are submitted, *each* claim must be *independently* supported by submissible evidence. *Wolfe v. Harms*, 413 S.W.2d 204 (Mo. 1967); *Weast v. Festus Flying Service, Inc.*, 680 S.W.2d 262 (Mo. App. 1984). In order to sustain a submission and finding of punitive damages under Instruction No. 26, even under Martin's theory of *respondeat superior*, there would have to be evidence that *both* O'Leary and Shearson acted with the required outrageousness. The court of appeals held that there was no evidence from which it could be found that Shearson acted outrageously. (Opinion, App. 6-7.) Therefore, there was no basis to submit punitive damages under Instruction No. 26 and the court of appeals correctly held that the record did not support an award of punitive damages.

C. Martin Is Not Entitled To An Award Of Punitive Damages Because O'Leary Was Not Acting With Apparent Authority As A Matter Of Law.

Even if Martin had submitted punitive damages under a theory of *respondeat superior*, she still could not recover because O'Leary was not acting as Shearson's agent as a matter of law. Under Missouri law, in order to support *respondeat superior* liability against Shearson, there must be a finding that O'Leary was acting within the scope and course of her employment. In order to meet this requirement, Martin submitted on the theory that O'Leary was acting with apparent authority when she recommended Martin purchase securities at a competing brokerage firm. (See Instruction Nos. 13, 17, 18, App. 54, 55, 56.) Under Missouri law, O'Leary could have had apparent authority only if *Shearson* created such an

appearance of things that it caused Martin to reasonably and prudently believe that O'Leary had power to act as Shearson's agent with respect to Martin's AMCCP transactions at Christopher. *Mahoney v. Delaware McDonalds Corp.*, 770 F.2d 123 (8th Cir. 1985).

In the present case, Shearson's conduct as a matter of law could not have led Martin to reasonably and prudently believe that O'Leary was acting on Shearson's behalf because: (1) in the same conversation in which AMCCP was identified to Martin and in which Martin said she wanted to purchase AMCCP, O'Leary told Martin to purchase AMCCP stock at a competing brokerage firm because O'Leary would be leaving to work there; (2) Martin knowingly sent checks to the competing firm for such purchases; (3) the competing firm sent confirmations reflecting those purchases and monthly statements which reflected the value of Martin's AMCCP in her account at the competing firm; and (4) Martin never received any confirmations or statements from Shearson. No one, no matter how unsophisticated, could reasonably and prudently believe that Shearson had authorized O'Leary to sell stock at a competing firm.

Furthermore, as a matter of law, there was no *act of Shearson* that could have led Martin to believe O'Leary was authorized to so act for Shearson with respect to Martin's AMCCP transactions. Martin's apparent authority theory boils down to the claim that because O'Leary was a Shearson employee and Shearson had an "800" phone number on which Martin contacted O'Leary, it was reasonable for Martin to believe O'Leary was acting for Shearson when she recommended Martin purchase AMCCP at a competing firm. This same claim was

rejected in *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873 (7th Cir. 1992), *cert. denied*, 1992 WL 15322 (U.S. June 21, 1993). Accordingly, O'Leary was not acting within the scope of her employment and there is no basis for *respondeat superior* liability for punitive damages.

The issues of punitive damages under Missouri common law, the evidence necessary to support such damages and the submission of such damages under a mandatory state instruction do not present important question of federal law that need to be resolved by this Court. In holding that the record did not support a finding of punitive damages under the instruction tendered by Martin, the court of appeals did not so far depart from the accepted and usual course of judicial proceeding as to require this Court's supervision.

CONCLUSION

For the foregoing reasons, Annabelle Martin's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

Reggie C. Giffin
Christopher D. Schneider
Morrison & Hecker
2600 Grand Avenue
Kansas City, Missouri 64108-4606
(816) 691-2600
(FAX) 474-4208

Attorneys for Respondent
Shearson Lehman Hutton, Inc.